

1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE EASTERN DISTRICT OF VIRGINIA
3 Richmond Division

4 The United States of America,

5 plaintiff

6 versus

3:08 CV 709

7 Jean Cunningham, et al.,

8 defendants

11 October 5, 2009

12 Richmond, Virginia

15 before: HONORABLE RICHARD L. WILLIAMS
16 Senior United States District Judge

17 Motion for Summary Judgment

20 Gilbert F. Halasz, RMR
21 Official Court Reporter
22 U.S. Courthouse
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APPEARANCES

Richard Dellheim, Esq.

Lema Bashir, Esq.

Robin E. Perrin, Esquire

for the plaintiff

Robert E. Dybing Esq.

for the defendants

1 THE CLERK: Case number 08 CV 709.

2 United States versus Jean Cunningham, et al.

3 Plaintiff is represented by Robin Perrin,

4 Lema Bashir and Richard Dellheim.

5 Defendants are represented by Robert Dybing.

6 Are counsel ready to proceed?

7 MR. DYBING: We are.

8 MR. DELLHEIM: Yes.

9 THE COURT: We are here on cross motions for
10 summary judgment. Who wants to argue on behalf
11 the United States?

12 MS PERRIN: Your Honor, I would introduce
13 Richard Dellheim from the Department of Justice.
14 He will be here on behalf of the United States.

15 MR. DELLHEIM: Good morning.

16 THE COURT: Do you want to argue or submit it
17 on the record as made? What is your pleasure?

18 MR. DELLHEIM: I would like to make a few
19 brief remarks.

20 THE COURT: All right. Fine.

21 MR. DELLHEIM: Good morning, Your Honor,
22 counsel. And may it please The Court, my name is
23 Richard Dellheim. Along with co-counsel, Lema
24 Bashir and Robin Perrin we represent the United
25 States in this matter.

1 Your Honor, just nine months ago this court
2 addressed and decided the very issues presented by
3 the defendants' summary judgment motion. Then, as
4 now, the defendants argued that the right to vote
5 guaranteed by UOCAVA violated by a state's late
6 mailing of absentee ballots. The Court rejected
7 that argument then and we urge The Court to reject
8 it again today. There are several compelling
9 reasons why.

10 First, and perhaps most importantly, if the
11 right to vote encompassed by UOCAVA is to mean
12 anything at all it is that states have to mail
13 absentee ballots to voters within sufficient time
14 before the election so the voter can receive the
15 ballots, mark them, and return them in time to be
16 counted. Timing is, therefore, critical.

17 Secondly, the evidence here --

18 THE COURT: But in this case if you counted
19 the ballots that we are talking about it would not
20 have impacted the election; is that correct?

21 MR. DELLHEIM: That's correct, Your Honor.
22 It will not change the results of the election;
23 however, it will do something --

24 THE COURT: But does the doctrine of mootness
25 factor into this?

1 MR. DELLHEIM: No, sir, it does not.

2 THE COURT: Why?

3 MR. DELLHEIM: Because the right that is
4 encompassed within UOCAVA is the right to vote and
5 not the right to change elections. The right to
6 vote is at the heart of this case. And for voters
7 to be deprived of that right --

8 THE COURT: But it seems to me that if you
9 enter a court order that guarantees in the future
10 that this won't occur prospectively, that that is
11 one issue. But something that is now moot, even
12 if you counted them, does that just give the voter
13 the satisfaction of knowing his vote was counted?

14 MR. DELLHEIM: That is the essence of the
15 right to vote is that every American citizen has
16 the opportunity to make his or her voice heard for
17 his or her candidate of choice.

18 THE COURT: All right.

19 MR. DELLHEIM: That is the right that we are
20 fighting to vindicate here.

21 THE COURT: So you are saying that those
22 votes have to be counted now, even though it would
23 not impact the outcome of the election?

24 MR. DELLHEIM: Yes, sir. That is, I would
25 add, Your Honor, that is the typical remedy in

1 UOCAVA cases. I am unaware of any UOCAVA case in
2 which the votes that have been deprived would have
3 changed the result of any election. But what is
4 the heartland of what we are talking about here is
5 American citizens' right to have his or her voice
6 heard and his or her vote counted.

7 THE COURT: All right.

8 MR. DELLHEIM: Your Honor, the evidence here
9 is undisputed that Virginia deprived as many as
10 2,000, or over 2,000 of its citizens that right to
11 vote by sending ballots out too late for them to
12 be counted.

13 That late mailing violated UOCAVA. And that
14 conclusion is supported by unanimous case
15 authority spanning many decades from many
16 jurisdictions throughout the country. Also,
17 supported by this Court's December 8, 2008 order
18 in which it found based upon the full record
19 before it that if Virginia in fact did mail
20 ballots late, then it did clearly "violate
21 UOCAVA."

22 That well-reasoned conclusion of this court
23 should continue to govern disposition of the
24 issues before it now.

25 But that is not all, Your Honor.

1 Straight-forward application of precedence, the
2 undisputed facts, lead to the same conclusion. As
3 a legal matter, Your Honor, and as a matter of
4 common sense the defendants' arguments here must
5 fail. Their basic argument is simple. It is that
6 because UOCAVA does not contain a deadline by
7 which states must mail their ballots the
8 defendants conclude that UOCAVA -- or the mailing
9 of late ballots cannot violate UOCAVA. This
10 sweeping defense would, of course, gut UOCAVA. In
11 so doing it opened door to wholesale voting
12 deprivations throughout the Eastern District of
13 Virginia and elsewhere.

14 Indeed, were the defendants' arguments to
15 succeed here election officials in the Eastern
16 District and elsewhere could reasonably and
17 rightly conclude that they could not merely mail
18 ballots late, but not mail ballots at all. They
19 could consider themselves free of any obligation
20 to mail ballots to military and overseas voters.
21 That simply cannot happen.

22 As courts have recognized --

23 THE COURT: Well, mailing of late isn't
24 functionally the same thing as not mailing them
25 all, is it?

1 MR. DELLHEIM: As I understand the
2 defendants' argument, Your Honor, their argument
3 is UOCAVA can never be violated by late mailing or
4 non existent mailing given the facts that there is
5 no deadlines.

6 THE COURT: But the functional equivalency is
7 the same if you mail them late. You know they
8 won't have any effect.

9 MR. DELLHEIM: That is absolutely correct.

10 THE COURT: All right.

11 MR. DELLHEIM: As courts have recognized,
12 inherent in UOCAVA's core obligation is to mail
13 ballots out in time to be counted; otherwise, the
14 right to vote, as The Court just noted, would be
15 illusory.

16 The compliance standard that Congress adopted
17 when it passed UOCAVA is simply one of
18 reasonableness. States must give overseas voters
19 a reasonable opportunity to receive their ballots,
20 mark them, and return them in time for counting.

21 What constitutes reasonableness is, of
22 course, a fact matter. Here, in this case, the
23 evidence is undisputed, the factual evidence is
24 undisputed that it takes on average 30 days for
25 mail to go overseas and be returned.

1 This evidence is not merely opinion evidence,
2 it is based upon facts provided by federal mailing
3 of federal authorities that are responsible for
4 carrying and delivering mail. Thus Virginia's
5 failure here to insure overseas voters have at
6 least 30 days to receive their ballots and return
7 them violates UOCAVA. It did not give them a
8 reasonable opportunity to vote.

9 Your Honor, a few words about the defendants'
10 other arguments in this case. First, the
11 defendants avow there is no harm flowing from the
12 late mailing, or even the non-existent mailing, of
13 absentee ballots because Congress provided a
14 back-up emergency provision in UOCAVA. I am
15 talking about the Federal Write In Absentee
16 ballot, or FWAB, F-W-A-B.

17 That argument has to fail for a couple
18 reasons. Number one, it is utterly inconsistent
19 with UOCAVA's structure and purpose. Moreover, it
20 improperly restricts this court's jurisdiction to
21 craft a complete remedy to a federal law
22 violation. And perhaps most importantly it would
23 unduly and improperly burden UOCAVA voters. Here
24 is why.

25 UOCAVA voters would have to know of the

1 existence of FWAB. They would have to have access
2 to it. They would have to have the technology to
3 download it and print it. And they would have to
4 do their own research as to the candidates,
5 offices, and ballot propositions. They would have
6 to do further research as the state law requires
7 about when a ballot can be returned and the
8 deadline by which they must be returned. Those
9 burdens are substantial. The right to vote
10 guaranteed by section 102 of UOCAVA is simply not
11 the same opportunity presented by the emergency
12 back-up provision that Congress crafted in terms
13 of the FWAB.

14 The defendants trying to shift the burdens on
15 to military and overseas voters simply has to be
16 rejected.

17 Second, the defendants contend that the
18 30-day compliance standard advocated here and
19 adopted by The Court's is "absurd." They say that
20 because, as I understand it, it would require some
21 election officials to mail some absentee ballots
22 on the same day that a ballot request is received.
23 Number one, the defendants decline to put any
24 evidence, any fact in this record to support that
25 argument. Number two, the United States would

1 contend, with respect, that it is simply not
2 absurd to expect local election officials in
3 certain instances to act with appropriate dispatch
4 and haste in terms of mailing absentee ballots.

5 Moreover, Your Honor, it is -- the 30-day
6 compliance standard here advocated by the United
7 States is not incompatible with any other
8 provision of UOCAVA. Section 103 of UOCAVA which
9 deals with FWAB acknowledges there are certain
10 jurisdictions where the ballot application
11 deadlines fall within 30 days of the election. In
12 those circumstances the 30-day standard simply
13 can't apply. It doesn't apply. UOCAVA cannot be
14 violated when those states because of state law
15 cannot reasonably get ballots to voters because
16 ballot application deadlines fall within 30 days
17 of the election.

18 Finally, Your Honor, we have to recall that
19 at stake in this case is the right to vote. It is
20 perhaps the most fundamental right of all rights
21 of American citizenship.

22 That right has been summarily denied to up to
23 and over 2,000 of Virginians overseas and military
24 voters who themselves did nothing wrong. They
25 simply want their vote to count. This Court with,

1 all due respect, Your Honor, must protect those
2 voters, especially those wearing a uniform, many
3 of whom stand in harm's way and risk their lives
4 to insure freedom abroad but through no fault of
5 their own have been denied the right to vote here
6 at home.

7 THE COURT: All right.

8 I think I understand your position.

9 MR. DELLHEIM: Thank you, Your Honor.

10 Accordingly, the United States respectfully
11 requests this Court safeguard their right to vote,
12 and based on its prior rulings, unanimous case
13 authority, and the undisputed facts, grant summary
14 judgment on behalf of United States.

15 THE COURT: All right.

16 MR. DELLHEIM: Thank you, Your Honor.

17 MR. DYBING: Good morning, may it please The
18 Court, Robert Dybing on behalf of the State Board
19 of Elections of the Commonwealth of Virginia.

20 It is indeed ironic to hear the United States
21 talk about the federal write-in ballot as a
22 clumsy, impossible, or improbable of being obeyed
23 by military and overseas voters. And yet that is
24 the remedy that Congress crafted to address the
25 very concern that exists in this law suit.

1 The question is clear. What happens if
2 states for whatever reason, or in Virginia the
3 general registrars who do the mailing, what
4 happens if they are late sending out absentee
5 ballots? That is a real problem. Congress
6 recognizes it. In UOCAVA, the statute dealing
7 with overseas and military voters, Congress said,
8 look, if states are late getting that ballot out
9 you have the right to vote using a federal
10 write-in ballot.

11 Now, Congress, of course, as The Court is
12 aware, enacted that federal write-in ballot
13 provision to address that concern. Now, the
14 Department of Justice's position is Congress made
15 a mistake, that that remedy is not easily
16 exercised. That the voters overseas don't know
17 which candidates to vote for and might not have
18 access to the information necessary to cast the
19 federal write-in ballot. Well, to that I think
20 one must only observe that it is for Congress to
21 decide what remedy to apply, and if Congress
22 imposes a failed remedy, or a weak remedy, it is
23 not the Department of Justice or the judiciary to
24 craft a substitute remedy that would address
25 whatever failings Congress left in its statute.

1 I think it is indeed doubly ironic that had
2 the overseas voters who were not allowed to vote,
3 who didn't vote in the November 2008 general
4 election, if those voters had voted using the
5 federal write-in ballot, we would not be here
6 today. Because there would have been no
7 violation. Each of those voters would have voted.
8 But because those voters did not, for whatever
9 reason, exercise the remedy that Congress gave
10 them the intervenor stands before this court
11 saying that Virginia violated UOCAVA. And I
12 submit that that presents an irreconcilable
13 conflict. Congress can not have, A, provided a
14 remedy to address a real election procedure,
15 namely the federal write-in ballot, and at the
16 same time penalize states and claim that states
17 have violated UOCAVA by doing the very thing that
18 Congress created the remedy for.

19 I submit that it is internally inconsistent
20 for the Department of Justice to take a position
21 that UOCAVA should be respected and yet ignore the
22 write-in ballot provision and focus only on other
23 provisions.

24 It is clear that the 30-day period is a
25 number. It was created apparently by a federal

1 employee. It certainly was not created by
2 Congress. Certainly does not command the respect
3 of this court in terms of either chevron deference
4 or any kind of deference whatsoever. It is merely
5 a number.

6 And when we repeatedly challenge the
7 Department of Justice to back up the 30-day figure
8 they couldn't. All they could do is say it is an
9 estimate of a reasonable time. Well, Congress
10 knows well how to estimate reasonable time. In
11 fact, as The Court is aware, there are plenty of
12 time periods in UOCAVA. 60 days to do this. 90
13 days to do that. If Congress intended that there
14 be a 30-day period as a paradigm of
15 reasonableness, Congress would have said so.

16 Ironically, again, at long last in the reply
17 memorandum the Department of Justice for the first
18 time points to a specific provision of UOCAVA that
19 they claim Virginia violated. And they claim
20 that that is section 102 A 1 of UOCAVA, which is
21 codified at 1973 FF1A1.

22 If it please The Court, it is a short
23 provision, and I would simply like to read it. It
24 says, "Each state shall permit absent uniformed
25 services voters and overseas voters to use

1 absentee registration procedures and to vote by
2 absentee ballot in general, special, primary, and
3 run-off elections for federal office." That is
4 what that provision requires.

5 Virginia does so provide that ability in
6 section 24-2612 of Virginia code the State of
7 Virginia enacted a theme to provide a means for
8 absentee voting. So Virginia did what UOCAVA
9 commanded.

10 Now, if the United States is saying but what
11 Congress really meant to put in is a
12 reasonableness standard, and in particular a
13 30-day standard in this provision, and that is
14 what they are asking this court to enforce. I
15 submit, Your Honor, that it would be improper.

16 THE COURT: You, in effect, are saying that
17 Virginia law for all practical purposes could
18 disenfranchise all servicemen if they are in a
19 remote territory if you just follow state
20 procedures. Is that your position?

21 MR. DYBING: No, not in the least.

22 THE COURT: Absentee ballots, if I am in
23 Denver vacationing or something, that is one
24 thing; but if I am serving my country in
25 Afghanistan it seems to me that your procedures

1 basically disenfranchise the 2,000 Virginians who
2 are serving overseas.

3 MR. DYBING: Your Honor, if there is an
4 overseas voter who for whatever reason does not
5 receive a Virginia absentee ballot in time,
6 whatever that time might be, that voter has the
7 right to vote using a federal write-in ballot.
8 And I must reiterate that for the intervenor to
9 suggest that that remedy is insufficient, that
10 there needs to be a more elaborate, or more formal
11 remedy that the states have to abide by, is simply
12 to ignore what Congress said and craft and
13 entirely new legislative scheme on top of UOCAVA,
14 one that Congress had the opportunity to enact if
15 it wished, but it didn't.

16 And the list of state responsibility under
17 UOCAVA in FF1 is very precise in terms of what
18 states need to do. And, in fact, in that section
19 paragraph 2 there is a reference to what happens
20 if applications are received within 30 days before
21 an election. Thus Congress knows how to say 30
22 days before an election when it wishes to. And if
23 Congress wanted to provide the states had to mail
24 absentee ballots out at least 30 days before an
25 election they clearly would have said so. And

1 that is not a part of the statute.

2 I understand the policy considerations
3 underlying the intervenors' position. They would
4 like to amend UOCAVA to provide a strict deadline
5 for states and to have some kind of remedial
6 program if states don't abide by the 30-day
7 requirement.

8 Well, that is for Congress to decide if they
9 wish at some point to amend UOCAVA. The Court is
10 aware from the record that there is indeed a bill
11 before Congress pending that would establish a
12 45-day deadline for states to mail out absentee
13 ballots. I understand the principle of
14 interpretation that says an unenacted statute
15 doesn't count for anything. We understand that.
16 I merely point out that it would be indeed curious
17 Congress would feel obliged to impose a deadline
18 in UOCAVA when the intervenor claims that one
19 already exists. I think The Court understands
20 what Congress is doing now in trying to deal with
21 exactly what is missing in UOCAVA right now. It
22 is a mandatory deadline applicable to the states.
23 Accordingly, UOCAVA is not ambiguous. If it
24 were ambiguous the FDAP would not have delegated
25 its rule-making authority at all to come up with a

1 30-day deadline.

2 THE COURT: All right.

3 MR. DYBING: There is no 30-day deadline in
4 UOCAVA, and Virginia cannot have violated UOCAVA.
5 Accordingly, we ask The Court to enter summary
6 judgment for the Commonwealth.

7 THE COURT: Thank you.

8 MR. DYBING: Thank you, Judge.

9 THE COURT: Any rebuttal argument,
10 Mr. Dellheim?

11 MR. DELLHEIM: Yes, sir. Thank you, Your
12 Honor. And very briefly.

13 Your Honor, Mr. Dybing read the provision
14 that in fact Virginia violated. Section 102 of
15 UOCAVA requires states provide overseas citizens
16 with the right to vote. That is what has been
17 denied Virginia's overseas voters in this case.

18 Secondly, Mr. Dybing says that the FWAB, the
19 emergency back-up write-in ballot, is essentially
20 the same opportunity to vote as provided by a
21 state ballot. It is simply patently untrue. It
22 is inaccurate. Congress made no mistake. What
23 Congress did is bend over backwards to try to
24 insure overseas citizens have a reasonable
25 opportunity to cast a ballot.

1 The FWAB is simply not the same opportunity
2 to vote as the regular state ballot, but it does
3 count for something. It was not a mistake. But
4 the opportunities are different, and it is not
5 appropriate under these circumstances to blame the
6 victim, blame overseas voters for not having
7 adequate access to the technology to download
8 those ballots and submit them.

9 Third, the 30-day standard here is a matter
10 of fact before this court. We provided affidavits
11 or declarations provided by the Military Postal
12 Service, the U.S. Postal, or excuse me, the State
13 Department and others that outline the minimum
14 time frames for delivering mail overseas and
15 getting them back again. The 30-day standard that
16 has been derived is based on those facts. Those
17 facts are undisputed in this record.

18 THE COURT: All right.

19 MR. DELLHEIM: Finally, with respect to the
20 bill that Mr. Dybing mentioned, the only thing we
21 can infer from the pending bill in Congress, and
22 we do not, of course, know whether it will pass,
23 but the only thing we can infer from that proposed
24 legislation is that the deadline observed here in
25 this case by this state were hopelessly

1 inadequate.

2 Thank you, Your Honor.

3 THE COURT: All right.

4 I will take the matter under advisement and
5 will issue an opinion in due course.

6 Mr. Dellheim, I believe when this case was
7 argued before me before there was either a lawyer
8 from the Department of Justice named Gonzales, or
9 somebody, that argued it.

10 MR. DELLHEIM: Yes, sir. Alberto
11 Ruiz-Sanchez.

12 THE COURT: Sanchez. Right.

13 He did a very effective job. Why did you
14 take him off the case? He went on to richer
15 rewards or what?

16 MR. DELLHEIM: Sadly, for the voting section
17 of the Department of Justice Mr. Ruiz-Sanchez has
18 gone on to another job within the Department,
19 which was a loss to our section, and perhaps to
20 this court.

21 THE COURT: All right.

22 Recess 2:00 o'clock.

23

24 HEARING ADJOURNED

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1 THE FOREGOING IS A TRUE AND CORRECT TRANSCRIPT.

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GILBERT FRANK HALASZ, RMR

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OFFICIAL COURT REPORTER

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